

IN THE COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF JASPER

SAVANNAH RIVERKEEPER,)
SOUTH CAROLINA COASTAL)
CONSERVATION LEAGUE, AND)
SOUTH CAROLINA WILDLIFE)
FEDERATION,)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF)
ENGINEERS, SAVANNAH DISTRICT;)
MAJOR GENERAL MEREDITH W. B. (BO)
TEMPLE, in his official capacity as Chief of)
Engineers, U.S. Army Corps of Engineers;)
COLONEL JEFFREY M. HALL, in his)
official capacity as District Engineer, U.S.)
Army Corps of Engineers, Savannah District,)

Defendants.)

CASE NO. _____

COMPLAINT
(Declaratory and Injunctive Relief
Sought)

The Plaintiffs show the Court as follows:

NATURE OF THE CASE

1. This action seeks a declaration that discharges made to the land, water, and environment in South Carolina in connection with the proposed Savannah Harbor Expansion Project by the Defendant United States Army Corps of Engineers (“Corps”) require permits pursuant to the South Carolina Pollution Control Act, codified as S.C. Code § 48-1-10 et seq., and appropriate injunctive relief.
2. The Savannah Harbor Expansion Project (“SHEP”) is a Corps civil works project. The proposed deepening of the Savannah River would degrade water quality, destroy marshlands, endanger a National Wildlife Refuge, put at risk threatened and

endangered species and other wildlife, and alter forever one of South Carolina's and Georgia's most valuable aquatic resources. Specifically, the SHEP proposal includes numerous discharges that require PCA authorization, including, but not limited to, the deposit of cadmium-laden material on the land, the discharge of highly oxygenated water to the Savannah River and its associated waters, and the deposit of dredged and/or fill material to the wetlands and waters of this State.

3. The South Carolina Pollution Control Act prohibits the discharge of pollutants to the land, waters, and the environment of the State without a permit. S.C. Code §§ 48-1-90, 48-1-10.

4. The Corps has not applied for a PCA permit for the discharges it intends to make to the land, water, and environment in South Carolina in conjunction with SHEP.

5. Plaintiffs seek a declaration from this Court that the Corps must obtain such a permit prior to making discharges of pollutants to the land, waters, and environment of the State of South Carolina in connection with SHEP.

6. The Savannah River is one of the most important natural resources of South Carolina, the Southeastern United States, and the entire country. Defendants' proposed deepening of the Savannah Harbor and the accompanying pollution of South Carolina's environment is one of the greatest threats to the health of the Savannah River in recent history. The PCA gives citizen groups, such as Plaintiffs, the opportunity to require compliance with the law protecting the environment and important resources such as the Savannah River and a voice in the future of the State's natural heritage.

JURISDICTION AND VENUE

7. Plaintiffs have the right to bring this action for declaratory and injunctive relief under section 48-1-250 of the PCA. See Georgetown Cnty. League of Women Voters v. Smith Land Co., 713 S.E.2d 287, 289-90 (S.C. 2011).

8. Venue for this action is proper in Jasper County pursuant to S.C. Code § 15-7-20.

9. The Clean Water Act, 33 U.S.C. §1323 provides in pertinent part:

“Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government

(1) having jurisdiction over any property or facility, or

(2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants, and each officer, agent, or employee thereof in the performance of his official duties, shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply

(A) to any requirement whether substantive or procedural (including any recordkeeping or reporting requirement, any requirement respecting permits and any other requirement, whatsoever),

(B) to the exercise of any Federal, State, or local administrative authority, and

(C) to any process and sanction, whether enforced in Federal, State, or local courts or in any other manner. This subsection shall apply notwithstanding any immunity of such agencies, officers, agents, or employees under any law or rule of law.”

PARTIES AND STANDING

Plaintiffs

10. The Savannah Riverkeeper, which was founded in 2001, is a 501(c)(3), non-profit organization dedicated to protecting the water quality of the Savannah River and the integrity of its watershed and promoting an enlightened stewardship of this unique heritage. One of the Riverkeeper's primary goals is to restore and protect water quality in the Savannah River, its lakes and tributaries, to fully support the uses of fishing, swimming, drinking, recreation and habitat protection for all South Carolinians and Georgians from the river's headwaters in the mountains of North Carolina to the Atlantic Ocean. Riverkeeper seeks to fulfill this goal by working to improve levels of dissolved oxygen in all areas of the basin; enhancing the environment for fisheries, including the survival of protected species; and ensuring that contaminants impacting the river are reduced to non-toxic levels.

11. Plaintiff South Carolina Coastal Conservation League ("League") is a not-for-profit corporation founded in 1989. The League is incorporated under the laws of South Carolina, maintains its headquarters office in Charleston, South Carolina, and currently has approximately 5,000 members. Its mission is to protect the natural environment of the South Carolina coastal plain and to enhance the quality of life of South Carolina communities by working with individuals, businesses, and government to ensure balanced solutions to environmental problems. Protecting wetlands and aquatic habitat in the Lowcountry of South Carolina has been an important goal of the League's since its establishment.

12. South Carolina Wildlife Federation (“SCWF”) is a non-profit citizens’ conservation organization founded by sportsmen in 1931. SCWF advocates environmental stewardship by promoting wildlife habitat enhancement and long-term natural resources conservation. In furtherance of its mission, SCWF conducts activities including reviewing and commenting on agency permit and policy decisions; encouraging protection of public lands and natural areas for all South Carolinians to experience; and working with individuals, groups, clubs and others with an interest in hunting and fishing to ensure that these resources are available for future generations to enjoy. SCWF has an office in Columbia, SC and counts approximately 5,200 hunters, fishermen, birders, naturalists, gardeners, and environmentalists among its members and supporters, with many residing in the Savannah River watershed.

13. Each of the Plaintiffs represent the interests of members who live in the immediate and general vicinity of the proposed deepening project and have an ongoing interest in protecting water quality and conserving wildlife and wildlife habitat in the areas impacted by the project. The project will impact the Lower Savannah River ecosystem, an area used, enjoyed, and depended upon by these organizations and their members for recreation, fishing, aesthetic enjoyment, wildlife observation, and other uses. Degradation of the Lower Savannah ecosystem, including its water quality, wildlife habitat and aesthetic value, will impair these organizations and their members’ use and enjoyment of the area.

14. As set forth above, the Plaintiffs and their members have interests which will be adversely affected and irreparably harmed by SHEP should the Corps violate the PCA. The Plaintiffs will be injured unless there is an order from this Court requiring

Defendants to obtain a PCA permit prior to making discharges to the land, water, and environment of South Carolina as a result of SHEP.

Defendants

15. Defendant Corps is an agency of the federal government that has the lead responsibility for SHEP, which is a Corps civil works project. The Savannah District of the Corps is responsible for implementing Section 404 of the federal Clean Water Act in Georgia and is headquartered in Savannah, GA.

15. Defendant Major General Meredith W. B. (Bo) Temple is Acting Chief of Engineers and Acting Commanding General of the Corps. As such, he is the official responsible for actions taken by the Corps and is sued in his official capacity.

16. Defendant Jeffrey M. Hall is the Commander and District Engineer for the Savannah District of the U.S. Army Corps of Engineers, and is sued in his official capacity. He supervises and manages all Savannah District decisions and actions.

17. All Defendants are responsible for compliance with all laws, including the laws of South Carolina protecting South Carolina's environment from pollution.

STATUTORY BACKGROUND

18. Under the PCA, it is “unlawful for any person, directly or indirectly, to throw, drain, run, allow to seep or otherwise discharge into the environment of the State organic or inorganic matter, including sewage, industrial wastes and other wastes, *except as in compliance with a permit issued by the Department.*” S.C. Code § 48-1-90 (emphasis added). The PCA's definition of “the environment” includes land and waters of the State. Id. § 48-1-10.

19. The PCA requires that the public be given the opportunity to participate in the permitting process before the discharge of pollutants into the environment of the State can be authorized under the statute. Under the PCA, the public has the right to comment and request a public hearing on a proposed permit before it is issued and to seek judicial review after it is issued. S.C. Code §§ 48-1-100, 48-1-150, 44-1-60(G).

FACTS

20. More than a dozen U.S. ports on the East Coast and along the Gulf of Mexico are scrambling to deepen their harbors at an enormous cost to taxpayers and the environment because the expansion of the Panama Canal, scheduled for completion in 2014, will make it possible for a new and larger class of container ships (known as “Post-Panamax” ships) to carry goods along the East-West trade lane. The competition to accommodate the Post-Panamax ships at ports in the Atlantic and Gulf regions is fierce, yet the Panama Canal Executive Director and the head of the American Association of Port Authorities have both explained publicly that not all of these proposed port expansions are necessary. Nevertheless, even in these difficult economic times, the Corps (the lead agency for purposes of undertaking these deepening projects) is evaluating each proposal in isolation from one another, which will lead to duplicative and costly overcapacity.

21. For more than a decade, the Corps has been evaluating the deepening of a 38-mile channel, which extends from the Atlantic Ocean to the Garden City terminal (located about 16 miles upstream in the Savannah River), to a maximum depth of 48 feet. In November 2010, the Corps released to the public a draft environmental impact statement purporting to evaluate the engineering, environmental, and economic

acceptability of various alternative project depths (44, 45, 46, 47, and 48 feet) over a 50-year analysis period. The current authorized depth of the harbor is 42 feet. In addition to channel deepening from the Atlantic Ocean through the Harbor Entrance Channel to the Garden City Terminal, the SHEP proposal includes channel widening to create meeting areas at Long Island and Oglethorpe Ranges, widening and deepening of the Kings Island Turning Basin, and channel widening at three bends. In addition, the SHEP proposal also involves the continued discharge of effluent from confined disposal facilities, and the transportation of sediments dredged from the entrance channel to the Savannah Ocean Dredged Material Disposal Site. The proposal also contemplates the discharge of dredged material for several aspects of the mitigation plan, including closing Rifle Cut; construction of a flow diversion structure and other modifications at McCoys Cut; deepening the upper portions of Middle and Back Rivers; removing the Tidegate and its abutments; and constructing additional features including a submerged sill and berm at the mouth of Back River, a submerged sill at the mouth of Middle River, three dissolved oxygen injection systems, a fish passage structure at the New Savannah Bluff Lock and Dam, a boat ramp on Hutchinson Island, and a restoration project at Disposal Area 1S.

22. In sum, the proposed deepening would cause substantial adverse impacts to resources of national significance and of great value to the states of South Carolina and Georgia. Unlike other ports, which are located in true harbors, Savannah's port is located approximately 16 miles upstream from the mouth of the river and adjacent to the Savannah National Wildlife Refuge, one of the oldest refuges in the country. Over time, repeated deepenings have caused saltwater from the Atlantic Ocean to intrude up the Savannah River, significantly altering the area's natural interface of saltwater and

freshwater. Saltwater intrusion has resulted in a number of significant problems, including severe losses of rare tidal freshwater marshes. According to the Corps, the harbor deepening would impact as many as 1,212 acres of freshwater wetlands. The Corps estimates that impact number will be reduced to 337 acres as a result of proposed flow-altering modifications, but those reductions are far from certain.

23. Successive deepenings of the Savannah River have contributed to the reduction of dissolved oxygen levels to critically low levels on the river's bottom. Dissolved oxygen declines imperil aquatic species while channel maintenance and deepenings directly destroy and disrupt wildlife habitat through dredging and the emplacement of millions of cubic yards of dredged spoil. Deepening the harbor also threatens to contaminate groundwater supplies by increasing salinity and reducing the thickness of the confining layer separating the bottom of the Savannah River and the Upper Floridan aquifer thereby facilitating saltwater intrusion into the aquifer under the navigation channel. Other natural resources threatened by the project include shortnose sturgeon, Atlantic sturgeon, and striped bass. Of particular concern here are negative impacts to the river's population of federally-endangered shortnose sturgeon and Atlantic sturgeon due to decreased dissolved oxygen levels and increased salinities in the habitat for these species.

24. Specific elements of the overall SHEP proposal require a permit under the PCA; however, the Corps has not applied for permits under the PCA. Upon information and belief, the Corps does not intend to apply for the required PCA permits prior to commencing work on SHEP.

25. The Corps plans to dispose of approximately 15 million cubic yards of sediment from the Inner Harbor in eight existing upland confined disposal facilities (“CDFs”), six of which are on the South Carolina side of the river, one or more of which will be located where a planned Jasper Port Terminal would be located. According to the draft environmental impact statement prepared in conjunction with SHEP, sediment testing indicates the presence of cadmium in the Miocene clays that would be excavated and/or exposed as part of the deepening project.

26. Cadmium is a metal found in natural deposits such as ores containing other elements. Exposure to certain forms and concentrations of cadmium is known to produce toxic effects on humans.

27. The disposal of dredged materials, including sediment-laden cadmium, on land (or water) in South Carolina requires a PCA permit.

28. The Corps has acknowledged that SHEP would make already serious water quality problems in the river even worse by adversely affecting dissolved oxygen levels. To mitigate for the lowering of water quality in the river, the Corps is proposing to install “Speece Cones” at various locations in an attempt to re-oxygenate the river. These Speece Cones would draw water out of the river, supersaturate the water with oxygen, and then inject supersaturated water into the river. Substantial questions have been raised regarding the effectiveness of this measure to raise the depleted levels of oxygen in the water column.

29. In addition to questions about the ability of the Speece Cones to remedy the overall lowering of dissolved oxygen levels in the River system, reviewers of the project, retained by the Corps, have raised concerns regarding the toxic effect of the

discharges from the Speece Cones on aquatic life. In February 2011, the Battelle Memorial Institute prepared the Final Independent External Peer Review Report for the Savannah Harbor Expansion Project (hereinafter referred to as the “Battelle Report”). In this report, Battelle expressed concerns about the impacts of the Speece Cones on aquatic species. According to the report, the plan to use the Speece Cones “appears to substitute the toxicity of low to zero oxygen concentration in the harbor waters to a similarly toxic environment by supersaturating the water column with DO over 10 times higher than normal levels.” Battelle Report at A-4. The report states further that: “[o]nce water becomes supersaturated (i.e., the oxygen concentration exceeds concentrations that can occur under natural conditions), the ability of fish to breathe is a concern.” Id. In fact, “in highly oxygenated water, oxygen bubbles will cling to fish gills and the fish will stop breathing.” Id. The Panel concluded that the discharge from the Speece Cones “can be toxic to fish that encounter it” and “[i]t would appear that the oxygen injection system proposed (Speece Cones) could have lethal impacts to fish species. Impacts to threatened and endangered species, such as shortnosed sturgeon, American shad, and striped bass, would be of special concern.” Id.

30. The discharge of artificially and dangerously high levels of oxygen from Speece Cones into South Carolina waters requires a PCA permit.

31. Other aspects of SHEP, including the discharge of dredged and fill material to South Carolina wetlands and waters, also require a permit under the PCA. For example, the SHEP proposal includes the direct filling of wetlands and other waters in South Carolina. These activities include, but are not limited to, removing the Tidegate

and its abutments and constructing a fish passage structure at the New Savannah Bluff Lock and Dam.

32. The Corps has not obtained the required permits under the PCA to authorize the discharge of any of these pollutants to the land, water, or environment of South Carolina. Upon information and belief, the Corps does not intend to obtain PCA permits in connection with the SHEP proposal.

CLAIM FOR RELIEF

(Violation of the South Carolina Pollution Control Act – Discharge of pollutants into the environment of the State without a permit)

33. The allegations of the preceding paragraphs are incorporated by reference as if repeated and set forth herein.

34. The PCA prohibits the discharge of pollutants into the land, waters, , and environment of the State without a permit. S.C. Code §§ 48-1-90, 48-1-10.

35. The Corps has not obtained a PCA permit authorizing it to dispose of cadmium and other dredged materials on the land and/or in the water in South Carolina. Nor has the Corps obtained PCA permits authorizing it to discharge highly oxygenated water, concentrated oxygen, or dredged and/or fill materials to waters in the State of South Carolina. These discharges would violate Section 48-1-90 of the PCA if they are made without the required PCA permits.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- A. Issue a declaratory judgment stating that the Corps must obtain permits under the Pollution Control Act for its discharges of cadmium and other pollutants to the land, wetlands, waters, and the environment of this State;

- B. Enter appropriate preliminary and injunctive relief to ensure that the Corps does not make unpermitted discharges to the land, wetlands, waters, and environment of the State of South Carolina;
- C. Award Plaintiffs the costs of this action; and
- D. Grant Plaintiffs such further and additional relief as the Court deems just and proper.

This the 3rd day of February, 2012.

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